



Date: AUGUST 6, 1999

Case No. 1999-INA-127

In the Matter of:

THE BAKERY HOUSE

Employer,

on behalf of:

KERSTIN MIESSNER

Alien.

Certifying Officer: Richard E. Panati
Philadelphia, PA

Appearance: Richard D. Steel, Esq.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination (FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.²

¹The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

²Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position of Baker with DOT Title Baker, DOT # 313.281-010, a wage offer of \$11.44 per hour, job duties of:

Make wide variety of baked goods, baking from raw materials (not premade) including pies, cakes, breads, tarts, cookies, muffins, eclairs, etc. Measure and mix all ingredients and cut, shape, bake dough, etc.

The stated job requirements were listed as two years of experience in the job offered or two years of experience in the related occupation of a Cook/Chef. Other special requirements included:

Must have at least six months baking from raw materials as specified in job description, demonstrated ability to perform job duties as described. (AF 17)

The application was denied by the CO on the basis that employer unlawfully rejected qualified U.S. workers. (AF 3-4) In the NOF, the CO found that U.S. workers Timothy Aleva³ and Joseph Carita had been rejected by the employer because they were either interested in a management position or did not have the requisite experience for the offered position. (AF 3-4, 14) The rejection of Mr. Aleva was later found to be lawful by the CO since he both showed an interest in a managerial position and declined to be interviewed by employer. (AF 3) Regarding Mr. Carita, the CO did not accept employer's rebuttal argument that despite Mr. Carita's training from the Culinary Institute of America and his more than 10 years of experience as a Head Baker, Baker & Pastry Chef in various kinds of establishments, he was not hired because he did not qualify as a gourmet or specialty baker. (AF 3) Employer had claimed that Mr. Carita's past jobs, described on his resume were not the kinds of positions that would qualify him as a gourmet or specialty baker. (AF 3) Employer's rebuttal documentation was found to be too

³The NOF and FD refer to Aleva v. Alleva as appears in the resume. (AF 25)

general and unsupported since Mr. Carita was not even given an opportunity to discuss his qualifications listed on his resume in an interview with the employer. (AF 4)

CONTENTIONS ON APPEAL

On appeal, employer contends on brief, among other things, that Mr. Carita, the worker found to be qualified by the CO was in fact unqualified for the position and was lawfully rejected for job-related reasons. As grounds for Mr. Carita's rejection, employer claims a distinction between the types of bakers and bakeries. In Mr. Carita's case, employer maintains that although he graduated from one of the most prestigious culinary arts schools in the country and has over 10 years of experience, the applicant was still found unqualified for the position. Employer contends that since its business is a "boutique-style" bakery, the duties of the job warrant a candidate who is able to prepare baked goods from raw materials, which excludes Mr. Carita whose background experience involves industrial-type baking from pre-made materials. Also, employer contends a reference check with one of Mr. Carita's previous employers in conjunction with an interview with employer and his resume, revealed that Mr. Carita did not have the requisite experience in baking and was in fact, interested in a managerial position and not the one being advertised by the employer for a Baker.

DISCUSSION

Where the applicant's resume indicates on its face that there is a reasonable possibility that he possessed the requisite experience, the Employer had an obligation to investigate his credentials further. *See Gorchev & Gorchev Design*, 1989-INA-118 (Nov. 29, 1990 (en banc)). *Cavalier's Bay Ctr., Inc.*, 1995-INA-90 (Jan. 27, 1997). Considering the extensive experience listed on the applicant's resume, Employer is required to produce objective and detailed reasons for rejecting the applicant after interview. *Orient Computer Corp.*, 1991-INA-322 (March 18, 1994). With such an extensive background, the applicant should have been interviewed. *See Pico Inv. Co.*, 1994-INA-249 (Oct. 4, 1995). Where an applicant's resume shows a broad range of experience, education and training that raises a reasonable possibility that the applicant is qualified, even if it does not state that he or she meets all requirements, an employer should further investigate the applicant's credentials by interview or otherwise. *See Dearborn Pub. Sch.*, 1991-INA-222 (Dec. 7, 1993). Subjective considerations must be supported by a person with first-hand knowledge of the facts presented. In the absence of first-hand evidence, the basis for rejection of a U.S. applicant is unsubstantiated. *American Fence Co.*, 1993-INA-55 (Dec. 27, 1993). Where the employer maintains that the applicant should be rejected because of poor references, the employer may nevertheless have a duty to investigate and interview the applicant where he or she otherwise meets the job requirements. *Cutting Corners, Inc.*, 1987-INA-376 (Apr. 5, 1988) (employer alleged that an anonymous agent told the employer that the applicant had a poor work history at a previous job). The burden of proof is *not* on the CO to prove that the U.S. applicant is qualified. *Venk Jewelry*, 1989-INA-348 (July 30, 1990) (panel noted that the employer did not prove that the applicant was not qualified enough to be interviewed; the

employer had alleged that it contacted one of the applicant's previous employers and a person answering the phone said the applicant had not worked there, but did not provide written documentation from that previous employer or any other credible evidence to contradict the applicant's resume).

Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. Section 656.21(j)(1)(iv) requires the employer to provide the local office with a written report of all post-application recruitment, which explains "with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed." In denying certification, the FD concluded:

This response is not accepted for the following reasons: First, as indicated in the NOF, Joseph Carita is a graduate of the Culinary Institute of America. In addition, his resume indicates that he has more than ten years of experience as a Head Baker, Baker & Pastry Chef in various kinds of establishments. On its face, his training & experience would appear to provide Mr. Carita with the qualifications needed to perform in all types of bakery establishments. While Mr. Carita did work as a baker for Shop Rite, he was also a head baker for a dinner theater & pastry chef for a restaurant in Longwood Gardens. Most significantly, Mr. Carita is a graduate of one of the most prestigious cooking schools in the United States, the Culinary Institute of America in Hyde Park, New York. It is implausible that this applicant does not have at least six months experience preparing baked goods from raw materials or would not know how to deal with problems that arise when preparing baked products with raw materials.

The rebuttal makes generalizations about the nature of Mr. Carita's experience that are not supported by the evidence, i.e., the resume. There is no evidence that the applicant was actually interviewed and asked about his qualifications and whether he could perform the duties of the position. Further, the information presented about the nature of Mr. Carita's employment with Three Little Bakers is likewise not accepted. Ms. Saunders admits that the current personnel manager of Three Little Bakers, Mr. Melba, was not familiar with the applicant. The information provided via a follow-up call that relayed Mr. Melba's conversation with "one of the owners" is so lacking in specificity that it is not credible.

The burden of proof is on the employer to show that U.S. workers are not able, willing, qualified or available for this job opportunity. Your failure to provide lawful job-related reasons for rejection of U.S. workers is a violation of Federal regulations. (AF 3-4)

The employer's brief on appeal disputes the CO's factual finding with respect to interview of Mr. Carita and contends that: "the employer's letter of June 20, 1997...specifically stated that she had talked to Mr. Carita" (Brief pp. 16-17); and that the CO "obviously ignored the fact that Ms. Stauffer had interviewed Mr. Carita when he stated that there was no evidence that Mr. Carita

had been interviewed” (Brief p. 19). However, the appeal ignores the context in which the CO’s statement concerning interview was made, namely “There is no evidence that the applicant was actually interviewed and asked about his qualifications and whether he could perform the duties of the position.” (AF 4) (underlining added) The June 20, 1997, letter referenced on brief stated:

Neither Joseph Canta [sic] nor Timothy Alleva have the experience needed for this type of job. Apart from the fact that in talking to both of them they were really interested in management positions, neither have the baking experience nor skills discussed above that we utilize and what is needed in our business. (AF 24) (underlining added)

Thus it is clear that there is no evidence that Carita was “actually interviewed and asked about his qualifications and whether he could perform the duties of the position.” At best, the evidence indicates that employer talked on the telephone to Carita about his alleged preference for management, but did not discuss his qualifications and ability. Moreover, employer’s claim that Carita was really interested in management is contravened by Carita’s letter to employer The Bakery House:

I consider myself a master cake decorator and finisher. I have been in management for most of my career, however, I would like to move back into the creative and artistic aspects of our buisness [sic]. (AF 26)

Apart from his Associate Degree in Culinary Arts from the Culinary Institute of America, his 18 years experience in high volume bakery production and training, Carita has, among other things, “coordinated the production and service of miniature tortes, pastries, rolls and fruit displays for banquets of 2,000 guests” and “[m]aintained the quality and service of three bakeries by establishing and implementing standard operating procedures.” (AF 26-28) Rather than a telephone interview about his preferences, Carita’s ostensible qualifications warranted an in person interview concerning his qualifications and ability. Hearsay by an anonymous part-owner of a prior employer does not suffice. The CO was clearly justified in concluding that such a statement “is so lacking in specificity that it is not credible.” It fails to identify the date of contact or the original source of the statement and thus is entitled to little, if any, weight.

The FD conclusion is fully warranted under the circumstances.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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